

2000 STATE BAR OF CALIFORNIA ENVIRONMENT SECTION NEGOTIATION COMPETITION FACT PATTERN

The small coastal town of San Pueblo, population 407, lies forty miles north of San Diego. For over 100 years, GlobalReach Oil operated a marine loading facility and a small tank farm. Tankers off-loaded oil at a pier and pumped it through underground piping below the beach and a portion of the town to the tank farm on the outskirts of San Pueblo. GlobalReach also trucked oil from the tank farm through the town. In 1925, a tanker truck overturned on Beach Street, releasing thousands of gallons of oil.

Ten years ago, the state Environment Department discovered oil contamination under the beach area and a portion of San Pueblo. It also found petroleum hydrocarbons in the groundwater. During the past ten years, GlobalReach, under a series of administrative orders issued by the Environment Department, has slowly characterized the area and extent of contamination, as well as the flow of the groundwater. GlobalReach has not completed work characterizing the tank farm area. The town residents have grown increasingly impatient, vocal, and angry about the contamination, the speed of the cleanup, the disruption of the town's life, the loss of tourism, and the fear that wholesale excavation of the town could destroy its eclectic, sleepy qualities. Their anger has been directed at GlobalReach, the Environment Department, and each other. Almost every resident and business owner and operator in San Pueblo is represented by an attorney.

One faction of the town has formed a group, called San Pueblo United ("SPU"). SPU, in turn, has aligned itself with a statewide environment group, Green NOW. SPU and GNOW have been active on many fronts. They have demanded that the Environment Department order a full excavation of contamination under the beach and town. Following notice requirements, they have filed suit against GlobalReach for cleanup, damages, penalties, costs, and attorney fees under state and federal law. SPU and GNOW believe that their lawsuit against GlobalReach was the main reason that the Environment Department filed its own lawsuit against GlobalReach. The Environment Department stated that its lawsuit was the result of growing frustration with the lack of progress in the cleanup of San Pueblo. The Department seeks an injunction for excavation, penalties, costs, and attorney fees.

GlobalReach's CEO, Alfredo Sands, visited San Pueblo and, after hearing the community's concerns and anger, proposed a cleanup plan. GlobalReach is willing to excavate the beach area, but not the contaminated areas under Beach Street and the town itself. Petroleum hydrocarbons naturally breakdown in the environment over time through "natural attenuation." GlobalReach would increase the speed of natural attenuation by introducing microorganisms that eat oil. GlobalReach estimates that the vast majority of contamination would be gone within seven years through the attenuation and microorganism process. GlobalReach believes that its natural attenuation proposal is consistent with the Environment Department's Containment Zone Policy, which supports a "no-action" approach to petroleum hydrocarbon contamination where the contamination is contained and poses a low threat to drinking water.

The groundwater under San Pueblo is primarily brackish, although there are some wells in the town at points east of the contamination and the ocean. The Environment Department previously designated the groundwater under San Pueblo as a "potential" source of drinking water. Thus, the contamination appears to be degrading a potential source of groundwater as the result of leaching from soil. In addition, the Environment Department has recently found trace amounts of petroleum hydrocarbons in the intertidal zone at the San Pueblo beach. The Department believes that this is evidence that the contamination is entering marine waters through the groundwater/marine interface. If true, the Environment Department may have claims for natural resource damages for impacts on the marine environment and on human uses of the area, including the beach. GlobalReach disputes the findings and argues that even if hydrocarbons are found in the intertidal zone, the source is much more likely fishing boats and other sea craft that use the area.

A number of people in San Pueblo support GlobalReach's cleanup proposal, and are angry at SPU and its "outsider" supporter GNOW. They believe that the plan offers the best chance to save the town and get their lives back. Others are much more militant and believe that SPU is acting irresponsibly by even talking to GlobalReach.

SPU and GNOW have raised two major claims in their lawsuit against GlobalReach.

Resource Conservation and Recovery Act, Sec. 6972. SPU and GNOW contend that the contamination and threat to groundwater constitute an “imminent and substantial endangerment” under RCRA, and that the violations give rise to a penalty claim for \$25,000 per day. GlobalReach discounts the claim, arguing that (1) the oil was product—not a “waste” as required by RCRA—when it was spilled; (2) the conduct alleged here—release of waste from oil pipelines or trucks—was in the past. Citizen groups have no standing to recover penalties for past violations under environmental statutes such as RCRA, where penalties are paid to the U.S. Treasury. *Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998); see *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987); *Ascon Properties v. Mobil Oil*, 866 F.2d 1149 (9th Cir. 1989); (3) the statute of limitations has run on any RCRA claims; and (4) civil penalties are not available for imminent and substantial endangerment violations. SPU and GNOW have responses to these challenges, but they create concern.

Proposition 65 (Safe Drinking Water Act), Health and Safety Code 25249.5 et seq. SPU and GNOW contend that the leaching of petroleum hydrocarbons into groundwater constitutes a release into a source of drinking water for each day in violation of Prop 65, subject to a penalty of \$2500 per day. GlobalReach contends that Prop 65 has a one year statute of limitations (this has never been determined under state law) and that the time period has run. GlobalReach also contends that the Environment Department’s designation of the San Pueblo groundwater as “potential drinking water source” does not make the groundwater a “source of drinking water” for purposes of Prop 65. See *Lungren v. Superior Court (American Standard)*, 14 Cal.4th 294 (1997); Health and Safety Code § 25249.5. Most importantly, GlobalReach argues that the contamination at San Pueblo occurred over time, and that it is acting at the behest of the Environment Department to remedy the site. Thus, any significant Prop 65 penalty makes no sense.

SPU/GNOW seek millions of dollars for funding of town projects. In addition, the groups seek guarantees for funding by GlobalReach of relocations of San Pueblo residents during construction, as well as a claims process for property and personal injuries that occur during construction.

The Environment Department has a strong legal position. Under the State Clean Water Act, Water Code Sec. 13000 et seq., no person may degrade potential sources of drinking water. The Department has extensive administrative authority to require cleanup. The Department has three primary concerns, however, of which GlobalReach and others are aware. First, the Department has issued an administrative cleanup order to GlobalReach, but has not pursued its administrative remedies against GlobalReach for its failure to complete cleanup. The Department is concerned that, under the doctrine of “primary jurisdiction,” the court may throw out any lawsuit and require that the issues first be addressed through administrative process. See, e.g., *Farmer’s Ins. Exchange v. Superior Court*, 2 Cal. 4th 377 (1992). Second, the Environment Department believes that its containment zone policy for natural attenuation of petroleum hydrocarbon plumes does not apply to the San Pueblo situation (because of the release and threat to groundwater), but it recognizes that the court may believe that policy and the lawsuit are inconsistent. Third, the Department is under tremendous public pressure to “do something” at the site, which may make a long-term full scale law suit problematic.

The Environment Department has an additional legal claim of some potential significance. If oil has been discharged to the marine environment, GlobalReach is subject to \$500,000 in penalty and must pay for “natural resource damages” under the Oil Spill Prevention and Response Act (“OSPRA”), Government Code Sec. 8670.3 et seq. This could cost GlobalReach millions of dollars, because natural resource damages include the value of the loss of recreation opportunities on behalf of the public who would otherwise have used and enjoyed San Pueblo beach. See, for a discussion of natural resource damages under analogous federal statutes, e.g., *General Electric v. U. S. Dept. of Commerce*, 128 F.3d 767 (D.C. Cir. 1997); *California v. Montrose*, 104 F.3d 1507 (9th Cir. 1997); Conner, Craig, “Natural Resource Damages under CERCLA and OPA,” in American Law Institute—ABA Continuing Legal Education Series, SD 67 ALI-ABA 145 (available on Westlaw). The Department must prove that at least one barrel (42 gallons) has been released to marine waters and it must prove damage to the natural resources. The Department has done some preliminary evaluation of both the release to marine waters issue and the value of natural resource damages recoverable under OSPRA. The Department’s experts believe that they can establish the contaminated groundwater as the source of hydrocarbons found in the intertidal zone, but that it will be time-consuming and expensive to do so in a manner that can be presented as scientific evidence in court. Natural resource damage assessment is also very expensive and time-consuming, and subject to great dispute. The Department believes that the loss of recreation opportunities (which is part of natural resource damage evaluation) could be quite large, as San Pueblo Beach is very popular, and usage has been curtailed because of the contamination. This could be a multi-million dollar claim if fully developed. All natural resource damage recoveries must be used to remedy the harm.

The Environment Department has stated publicly that it will insist that the contamination, including that under the town be remediated fully. The tank farm area has not been fully characterized, but the Department expects that area to be remediated as well if contamination is found. GlobalReach's preliminary report shows that contamination is not impacting groundwater or the rest of the town. The Department and citizen's groups have not had much chance to review the report, but believe that the report is neither conclusive nor complete.

The parties, GlobalReach, the Environment Department, and SPU/GNOW, have agreed to attempt to reach an early resolution of the San Pueblo situation in two segments. GlobalReach and the Environment Department will negotiate the nature and extent of remediation of the contamination and natural resource damages. GlobalReach and SPU/GNOW will address penalties, relocation of residents during construction, and attorneys fees.